

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Number: **201108010**

Release Date: 2/25/2011

Index Number: 2601.00-00, 9100.00-00

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:PSI:B04 – PLR-126385-10

Date:

November 05, 2010

Re:

Legend:

Donor
Spouse
Son
Date 1
Date 2
Date 3
Trust

Year 1
Year 2
Accountant

Company

Dear _____ :

This letter responds to the letter dated June 16, 2010, and subsequent correspondence, submitted by your authorized representative, requesting an extension of time under § 2642(g) of the Internal Revenue Code and § 301.9100-3 of the Procedure and Administration Regulations to allocate GST exemption to transfers to a trust.

FACTS

The facts and representations submitted are summarized as follows: On Date 1, Donor created an irrevocable trust, Trust. Article Three, Section 2 of Trust, provides that the trustee shall pay to or apply for the benefit of Donor, Spouse, and Son as much of the net income and principal of the trust, at such times or times that the trustee, in its sole and absolute discretion, determines, to or for the benefit of Donor, Spouse, and Son until Donor dies. Upon Donor's death, Trust will continue for the benefit of Son and

his descendants. Trust was funded with shares of stock in Company on Date 1 and Date 2.

On Date 3, Donor and Spouse each filed a Year 1 Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return, to report the Date 1 transfer to Trust. Donor and Spouse elected to treat the transfer to Trust as made one-half by each spouse under § 2513. When Accountant prepared the Forms 709, Accountant failed to allocate Donor's available GST exemption and Spouse's available GST exemption to the Date 1 transfer to the trust. Accountant did not prepare and Donor did not file any Year 2 Form 709 to report the Date 2 transfer to Trust.

Date 1 and Date 2 are subsequent to August 5, 1997 for purposes of § 2504(c) and prior to December 31, 2000 for purposes of § 2632(c)(1). It is represented that Donor and Spouse attached the trust instrument and an appraisal of the property transferred to Trust to the Year 1 Forms 709. For purposes of § 6501, more than three years has passed since Date 3, the date the Year 1 Forms 709 were filed.

Donor and Spouse request an extension of time under § 301.9100-3 to allocate Donor's GST exemption and Spouse's GST exemption to the Date 1 transfer to Trust, based on the gift tax value of the transfer as of the date of the transfer to the trust. Donor requests an extension of time under § 301.9100-3 to allocate Donor's GST exemption to the Date 2 transfer to Trust, based on the gift tax value of the transfer assets as of the date of the transfer to the trust.

LAW AND ANALYSIS

Section 2501(a)(1) imposes a tax for each calendar year on the transfer of property by gift during the calendar year by any individual, resident or nonresident. Section 2511(a) provides that subject to certain limitations, the gift tax applies whether the transfer is in trust or otherwise, direct or indirect, and whether the property transferred is real or personal, tangible or intangible.

Section 2504(c) provides that if the time has expired under § 6501 within which a tax may be assessed under chapter 12 on the transfer of property by gift made during a preceding calendar period, the value thereof shall, for purposes of computing the tax under this chapter, be the value as finally determined (within the meaning of § 2001(f)(2)) for purposes of this chapter.

Section 25.2504-2(b) of the Gift Tax Regulations provides that if the time has expired under § 6501 within which a gift tax may be assessed under chapter 12 on the transfer of property by gift made during a preceding calendar period and the gift was made after August 5, 1997, the amount of the taxable gift or the amount of the increase in taxable gifts, for purposes of determining the correct amount of taxable gifts for the

preceding calendar periods is the amount that is finally determined for gift tax purposes and such amount may not be thereafter adjusted. The rule in this paragraph applies to adjustments involving all issues relating to the gift including valuation issues and legal issues involving the interpretation of the gift tax law.

Section 2513(a)(1) provides, generally, that a gift made by one spouse to any person other than his spouse shall, for the purposes of chapter 12, be considered as made one-half by him and one-half by his spouse, but only if at the time of the gift each spouse is a citizen or resident of the United States.

Section 2513-1(b)(4) provides that if one spouse transferred property in part to his or her spouse and in part to third parties, split gift treatment is effective with respect to the interest transferred to third parties only insofar as the interest transferred to third parties is ascertainable at the time of the gift and severable from the interest transferred to the spouse.

In Rev. Rul. 56-439, 1956-2 C.B. 605, a gift is made in trust pursuant to which the trustee is to distribute any part or all of the income or principal of the trust to or among the spouse of the donor and other descendants of the donor at such times and in such proportions and amounts as the trustee determines in its sole discretion. The ruling concludes that, under the facts presented, the value of the right to receive the income or principal to be distributed to the spouse is not susceptible of determination. Therefore, the gift to the spouse is not severable from the gifts to the other beneficiaries, and the gift may not to any extent be considered as made one-half by the donor and one-half by his spouse within the meaning of § 2513.

Section 2601 imposes a tax on every generation-skipping transfer (GST) made by a “transferor” to a “skip person.” A “generation-skipping transfer” is defined under § 2611(a) as: (1) a taxable distribution; (2) a taxable termination; and (3) a direct skip.

Section 2602 provides that the amount of the GST tax is determined by multiplying the taxable amount by the applicable rate. Section 2641(a) provides that the term “applicable rate” means, with respect to any GST, the product of the maximum federal estate tax rate and the inclusion ratio with respect to the transfer.

Under § 2642(a)(1), the inclusion ratio with respect to any property transferred in a generation-skipping transfer is generally defined as the excess (if any) of 1 over the “applicable fraction.” The applicable fraction, as defined in § 2642(a)(2), is a fraction, the numerator of which is the amount of GST exemption under § 2631 allocated to the trust (or to property transferred in a direct skip), and the denominator of which is the value of the property transferred to the trust or involved in the direct skip.

Section 2631(a), as in effect for the tax years at issue, provided that, for purposes of determining the inclusion ratio, every individual shall be allowed a GST exemption of \$1,000,000 which may be allocated by such individual (or his executor) to any property with respect to which such individual is the transferor. Section 2631(b) provides that any allocation, once made, shall be irrevocable.

Section 2632(a) provides that any allocation by an individual of his or her GST exemption under § 2631(a) may be made at any time on or before the date prescribed for filing the estate tax return for such individual's estate (determined with regard to extensions), regardless of whether such a return is required to be filed. Section 26.2632-1(b)(4)(i) of the Generation-Skipping Transfer Tax Regulations provides that an allocation of GST exemption to property transferred during the transferor's lifetime is made on Form 709.

Section 2642(b)(1) provides that, except as provided in § 2642(f), if the allocation of the GST exemption to any transfers of property is made on a gift tax return filed on or before the date prescribed by § 6075(b) for such transfer the value of such property for purposes of determining the inclusion ratio shall be its value as finally determined for purposes of chapter 12 (within the meaning of § 2001(f)(2)).

Section 2652(a)(2) provides that if, under § 2513, one-half of a gift is treated as made by an individual and one-half of such gift is treated as made by such individual's spouse, then such gift shall also be treated as if made one-half by each spouse for purposes of the GST tax.

Section 26.2652-1(a)(4) of the Generation-Skipping Transfer Tax Regulations provides that in the case of a transfer with respect to which the donor's spouse makes an election under § 2513 to treat the gift as made one-half by the spouse, the electing spouse is treated as the transferor of one-half of the entire value of the property transferred by the donor, regardless of the interest the electing spouse is actually deemed to have transferred under § 2513. The donor is treated as the transferor of one-half of the value of the entire property.

Section 2642(g)(1)(A) provides that the Secretary shall by regulation prescribe such circumstances and procedures under which extensions of time will be granted to make an allocation of GST exemption described in § 2642(b)(1) or (2), and an election under § 2632(b)(3) or (c)(5). Such regulations shall include procedures for requesting comparable relief with respect to transfers made before the date of the enactment of this paragraph.

Section 2642(g)(1)(B) provides that in determining whether to grant relief under § 2642(g)(1), the Secretary shall take into account all relevant circumstances, including evidence of intent contained in the trust instrument or instrument of transfer and such

other factors as the Secretary deems relevant. For purposes of determining whether to grant relief, the time for making the allocation (or election) shall be treated as if not expressly prescribed by statute.

Notice 2001-50, 2001-2 C.B. 189, provides that under § 2642(g)(1)(B), the time for allocating the GST exemption to lifetime transfers and transfers at death, the time for electing out of the automatic allocation rules, and the time for electing to treat any trust as a GST trust are to be treated as if not expressly prescribed by statute. The Notice further provides that taxpayers may seek an extension of time to make an allocation described in § 2642(b)(1) or (b)(2) or an election described in § 2632(b)(3) or (c)(5) under the provisions of § 301.9100-3.

Section 301.9100-1(c) provides that the Commissioner has discretion to grant a reasonable extension of time under the rules set forth in §§ 301.9100-2 and 301.9100-3 to make a regulatory election, or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

Section 301.9100-3 provides the standards used to determine whether to grant an extension of time to make an election whose due date is prescribed by a regulation (and not expressly provided by statute). In accordance with § 2642(g)(1)(B) and Notice 2001-50, taxpayers may seek an extension of time to make an allocation described in § 2642(b)(1) or (b)(2) or an election described in § 2632(b)(3) or (c)(5) under the provisions of § 301.9100-3.

Requests for relief under § 301.9100-3 will be granted when the taxpayer provides the evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the government.

Under § 301.9100-3(b)(iv), a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election.

In the present case, Trust provides, in part, that the trustee shall pay to or apply for the benefit of Spouse as much of the net income and principal of the trust, at such times that the trustee, in its sole and absolute discretion, determines to or for the benefit of Spouse until Donor dies. Spouse's interests in the income and principal of Trust are not susceptible of determination and, therefore, her interests are not severable from the interests that the other beneficiaries have in Trust. See Rev. Rul. 56-439. However, under § 2504(c), the time for determining whether gift split treatment is effective with respect to the Date 1 transfer to Trust has expired. Therefore, for purposes of

chapter 13, Donor and Spouse will be treated as the transferor of one-half of the value of the entire property transferred to Trust on Date 1. Donor is the transferor of the entire amount of the Date 2 transfer for both gift and GST tax purposes.

Based upon the facts submitted and representations made, we conclude that the requirements of § 301.9100-3 are satisfied. Therefore, Donor and Spouse are granted an extension of time of 120 days from the date of this letter to allocate Donor's GST exemption and Spouse's GST exemption to the Date 1 transfer to Trust, based on the gift tax value of the transfer as of the date of the transfer to the trust. In addition, Donor is granted an extension of time of 120 days from the date of this letter to allocate Donor's GST exemption to the Date 2 transfer to Trust based on the gift tax value of the transfer as of the date of the transfer to the trust.

The allocations should be made on supplemental Forms 709 for the appropriate calendar year and filed with the Internal Revenue Service, Cincinnati Service Center—Stop 82, Cincinnati, Ohio 45999. A copy of this letter should be attached to the supplemental Forms 709.

The rulings contained in this letter are based upon information and representations submitted by the taxpayers and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Except as specifically ruled herein, we express no opinion on the federal tax consequences of the transaction under the cited provisions or under any other provisions of the Code. Specifically, we are not ruling on whether Trust will have a zero inclusion ratio as a result of the allocations of Donor's GST exemption and Spouse's GST exemption to the Date 1 transfer to Trust and the allocation of Donor's GST exemption to the Date 2 transfer to Trust. The rulings in this letter pertaining to the federal estate and/or generation-skipping transfer tax apply only to the extent that the relevant sections of the Internal Revenue Code are in effect during the period at issue.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

In accordance with a power of attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

Associate Chief Counsel
(Passthroughs and Special Industries)

By: _____
Lorraine E. Gardner, Senior Counsel
Branch 4
Office of Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosures

Copy for section 6110 purposes
Copy of this letter

cc: